88-764

Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

SAMUEL JONES, JR.,

Petitioner,

v.

PREUIT & MAULDIN, a partnership; and E.F. MAULDIN, individually and as Executor of the Estate of Leonard Preuit, deceased; and PREUIT & MAULDIN

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a qualified or good faith immunity to liability under 42 USCA § 1983 available to defendants who are not public officials or municipalities, and, if so, what are the elements of such immunity?

2. In February, 1982, was a state statutory attachment scheme clearly unconstitutional when personal property was authorized to be seized under the statute without notice or prior hearing or the right to an immediate post-seizure hearing on which the attachment could be dissolved, and did not mandate a judicial inquiry into the facts supporting the need for an attachment without prior notice?

PARTIES TO THE PROCEEDINGS

The following are all of the parties to proceedings in the Court of Appeals for the Eleventh Circuit:

Samuel Jones, Jr. . Plaintiff/Appellant

Edward F. Mauldin,
individually and
as Executor of the
Estate of Leonard Preuit,
deceased. . . . . Defendant/Appellee

Preuit Mauldin. . . Defendant/Appellee

Preuit & Mauldin,
a partnership . . . Defendant/Appellee

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REFERENCE TO REPORTS OF OPINIONS IN LOWER COURTS

The opinion of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed in this case is reported as Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988) (en banc). The original opinion of the United States District Court for the Northern District of Alabama is reported as Jones v. Preuit & Mauldin, 586 F. Supp. 1563 (N.D. Ala. 1984). The opinion of the U.S. Court of Appeals for the Eleventh Circuit reversing and remanding the original District Court judgment is reported as Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1986). The opinion of the United States District Court for the Northern District of Alabama on remand is reported as Jones v. Preuit & Mauldin, 634 F.Supp. 1520 (N.D. Ala. 1986). The

panel opinion of the United States Court of Appeals for the Eleventh Circuit affirming in part and reversing in part the second judgment of the District Court is reported as Jones v. Preuit & Mauldin, 808 F.2d 1435 (11th Cir. 1987). The panel opinion of the United States Court of Appeals for the Eleventh Circuit on petition for rehearing, which affirmed the second judgment of the District Court, is reported as Jones v. Preuit & Mauldin, 822 F.2d 998 (11th Cir. 1987). The opinion of the United States Court of Appeals for the Eleventh Circuit vacating that panel opinion and granting a rehearing in banc is reported as Jones v. Preuit & Mauldin, 833 F.2d 1436 (11th Cir. 1987). The opinion referred to in the first sentence of this paragraph is the decision on such rehearing in banc.

STATEMENT OF JURISDICTION

This petition seeks to bring before the Court for review the decision in banc of the United States Court of Appeals for the Eleventh Circuit entered on August 10, 1988. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

of law; nor deny to any person without its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

* * *

42 U.S.C. Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Alabama Code Section 6-6-43 (1975)

By Whom Issued

In the first and second cases mentioned in section 6-6-41, an attachment may be issued by any judge of the circuit court, returnable to any county in the state, or by the clerk of the circuit court, judge of probate or any district court judge, within their respective counties; in the third and fourth cases, only by a judge of the circuit court or judge of probate, returnable to any county.

Alabama Code Section 35-11-110 (1975)

Lien declared

Any blacksmith, woodworkman or other mechanic who contributes his labor and material, or either, to the production, manufacture or repair of any vehicle, implement, machine or article of any kind, shall have a lien thereon in the hands of any person for whom such vehicle, implement, machine or article was made or repaired, or to whom sold, and in the hands of any purchaser with notice of such lien, for

the agreed price, or the value if no price was agreed upon, of the labor and material, or either, contributed to the production, manufacture or repair of the same. Said lien shall be subordinate to any security interest under the Uniform Commercial Code in such vehicle, implement, machine or article, which security interest was perfected prior to the time said labor or material was contributed, unless the secured party holding said security interest authorized the contribution of said labor or material.

Alabama Code Section 35-11-111 (1975)

Right to Enforce Lien by Attachment

Any person entitled thereto may enforce such lien in any court of competent jurisdiction, by attachment issued by any officer authorized to issue such writs, upon executing bond as in other cases of attachment, and upon making affidavit that the attachment is not sued out for the purpose of vexing or harassing the defendant, and describing the property on which the lien is claimed and setting forth all the facts necessary to the creation of the lien under section 35-11-110, and the amount due, and that

one of the following causes of attachment exists:

(1) That the person for whom such vehicle, implement, machine or article was made or repaired, or to whom sold, is the owner thereof, and that the price, if agreed on, or if not, the value of the same, or of the repair thereof, or some part of either, is due and unpaid.

(2) That the person for whom such vehicle, implement, machine or article was made or repaired, or to whom sole, has tranferred or sold the same to a purchaser with notice of the lien, and that the price, if agreed on, or if not, the value of the same, or of the repair thereof, or of some part of either, is due and unpaid.

Alabama Rules of Civil Procedure, Rule 64

Seizure of Person or Property

(a) Seizure not involving protection of security interest in property. At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be

entered in the action are available under the circumstances and in the manner provided by law unless the action is for the recovery or possession of specific personal property under the provisions of Code of Alabama, Title 6, chapter 6, article 6, (Detinue), sections 6-6-250 through 6-6-264, or any other provisions of law whereby the owner of a security interest in personal property seeks to recover possession of said property prior to judgment.

(b) Seizure involving protection of security interest in personal property. When the action is for the recovery or possession of specific personal property under the provisions of Code of Alabama, Title 6, chapter 6, article 6, (Detinue), sections 6-6-250 through 6-6-264, or any other provision of law whereby the owner of a security interest in personal property seeks to recover possession of said personal property prior to judgment, the procedure on an application for such pre-judgment seizure shall be as follows:

(1) AFFIDAVIT. The plaintiff shall file with the court an affidavit on personal knowledge, except where specifically provided otherwise,

containing the following information:

(A) Description of Property. A description of the claimed property that is sufficient to make possible its identification and its location.

(B) Statement of Title or Right. A statement that the plaintiff is the owner of the claimed property or is entitled to possession of it, describing the source of such title or right and, it the plaintiff's interest in such property is based on a written instrument, a copy of said instrument must be attached to the affidavit.

(C) Statement of Wrongful Detention. A statement of specific facts which show that the property is wrongfully detained by the defendant and a statement of the cause of such detention according to the best knowledge, information and belief of the plaintiff.

(D) Statement of Risk of Injury. A statement of specific facts in support of the contention, if any, that there is risk of concealment, transfer or other disposition

of or damage to the property to the injury of the plaintiff.

(2) Proceedings

(A) Preliminary Examination by the Court. The court, without delay, shall examine the complaint, the application and supporting affidavit and its attachments and any further showing offered by the plaintiff in suppport of the plaintiff's right to the immediate possession of the property.

(B) Preliminary Finding for the Plaintiff; Writ of Seizure without Hearing; Hearing on Dissolution. If the court upon preliminary examination finds that the risk of concealment, transfer or other disposition of or damage to the property by permitting it to remain in the possession of the defendant between the filing of the action and the time of a hearing is real, then the court shall forthwith enter an order authorizing the issuance of a writ of seizure but the court shall provide in said order that the defendant is entitled, as a matter of right, to a prejudgment hearing on the issue of dissolution of the writ if a written request for hearing is served on counsel for the

plaintiff within five days from the date of seizure of the property by the sheriff or other duly constituted officer. If such a request is made, the writ shall expire upon the fifteenth day from said date of seizure unless the court, after hearing, continues the order in effect. The expiration of the writ shall not prejudice the right of the plaintiff to a reinstatement thereof but any such reinstatement shall not be made without notice and hearing. If no request for a hearing is made within the five-day period, the writ shall remain in effect pending further order of the court but, the court, in its discretion, may hear a request for dissolution of the writ although said request is served more than five days from the date of seizure.

(C) Failure to Make Preliminary Finding for the Plaintiff; Order for Hearing; Hearing on Writ of Seizure. If the court fails to make a preliminary finding for the plaintiff under subdivision b(2)(B) of this rule, the court shall order and direct that the plaintiff's application to the court for a writ of seizure or such other writ be set down for a hearing before the court at the earliest practical time and

notice of time, date and place of said hearing shall be forthwith served on the defendant. Said notice to the defendant shall provide that the defendant shall not dispose of or alter in any form the personalty therein described pending the hearing of the application and shall state that if the defendant does dispose of or alter the personalty sought to be recovered, he shall be subject to punishment for contempt of court. At such hearing the plaintiff shall have the burden of showing good cause for the pre-judgment seizure but the failure of the defendant to appear shall be deemed a waiver of any objections to the pre-judgment seizure.

STATEMENT OF THE CASE

Samuel Jones, Jr., the plaintiff, is a forty-five year old black man who farmed all his life in Lawrence County, Alabama until 1983. Over the years he had acquired three cotton pickers which he used to harvest his own crop as well as hiring out to others. The original cost of the cotton pickers was $21,000, $9,500, and $1,000. In July, 1981 he employed Preuit & Mauldin, a farm equipment dealer, to repair the three pickers. The repair bills were $2,146.87, $768.09, and $7,310.82 respectively. Sherman Crisler, manager of Preuit & Mauldin, solicited the work from Jones and told him not to worry about payment until the fall of 1981. Mr. Jones also owed money to the Farmers Home Administration, and the checks he got for his cotton in the fall

of 1981 were made out jointly to FHA and him. When he took the checks to the FHA, they refused to let him have any part of the money, applying it all to his debt. Dan Gilchrist, who leased some farmland to Jones, and the Citizens Bank, which had a security interest in two of the pickers sought to help Mr. Jones financially, were negotiating with Crisler, and had offered to pay money to Preuit & Mauldin, but at that point, on April 8, 1982, Preuit & Mauldin caused the three cotton pickers to be seized by the Sheriff of Lawrence County, under color of State law, by obtaining three writs of attachment without notice or hearing, which Alabama statutes and rules permitted. No statute or rule provided for a post-seizure hearing to dissolve the attachment and none was authorized by

law. Ex parte Martin, Ala. Civ. App., 412 So.2d 815, 816-17 (1982). After the pickers were seized, the Citizens Bank was unwilling to extend additional credit to Mr. Jones, but as the holder of recorded security interests in the pickers, Citizens Bank filed what was styled a Motion to Dissolve the writs of attachment, requesting a hearing. On the same day, April 8, 1982, the writs were issued the pickers were seized. No interlocutory hearing was ever held on the Bank's motion. A default judgment was entered against Mr. Jones on May 19, 1982 and the case came on for final hearing on June 15, 1982 on the claimed priority of the recorded security interest of Citizens' Bank over Preuit & Mauldin's lien raised by the Bank's so-called motion to dissolve. 476 So.2d 103, 105 (1985).

The state trial court on July 2, 1982, denied the Motion to Dissolve, finding the Bank's recordation defective,[1/] and ordered the cotton pickers sold. On August 30, 1982 one of the diesels was judicially sold to Preuit & Mauldin for $1,400; and the butane model was sold for $500 to Preuit & Mauldin. On September 13, 1982, the second diesel was sold to Preuit & Mauldin for $1,500. All three prices were a small fraction of the repair bills. It is undisputed that Benjamin A. ("Buddy") Rose was on his way to the County Courthouse to bid on the third cotton picker, when he met Sherman Crisler, Preuit & Mauldin's manager. Rose told Crisler he was planning to bid.

1/ Reversed in Citizens Bank v. Preuit & Mauldin, 425 So.2d 478 (Ala. Civ. App. 1982). But see Citizens Bank v. Preuitt & Mauldin, 476 So.2d 103, 105 (1985).

Crisler told Rose his top bid on behalf of Preuit & Mauldin would be $2,000, and if Rose would refrain from bidding he would let Rose have the cotton picker for $500 over his bid. Rose refrained from bidding and Preuit & Mauldin bid it in for $1,500, the only bid made. Then Preuit & Mauldin welshed on the bid-rigging deal with Rose and refused to sell it to him even for $3,500. Edward F. Mauldin thereafter operated this picker himself in his own field.

Plaintiff commenced this action on February 24, 1984, alleging that the defendants violated the Civil Rights Act of 1871, 42 U.S.C. § 1983, by causing his cotton pickers to be seized without notice or hearing. The district court initially dismissed the complaint on the ground that Mr. Jones' claim for relief

was barred on its face by the one-year statute of limitations formerly contained in Alabama Code, § 6-2-39(a)(5) (1975), embellishing this opinion by a citation to the "Quitting Time at the Plantation" scene from the screen play of Gone With the Wind, where Big Sam, the foreman, says: "I'se de one dat sez when it's time to quit." Jones v. Preuit & Mauldin, 586 F. Supp. 1563 (N.D. Ala. 1984). Upon Mr. Jones' appeal from this judgment, the United States Court of Appeals for the Eleventh Circuit reversed, holding that the appropriate statute of limitations was six years under Alabama Code, 1975, § 6-2-34(1). Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir., 1985), and this Court denied certiorari. Preuit & Mauldin v. Jones, 474 U.S. 1105 (1986). Thereafter, on May 23, 1986, the

district court entered a final order granting summary judgment for the defendants. Jones v. Preuit & Mauldin, 634 F.2d 1520 (N.D. Ala. 1986).

Mr. Jones appealed a second time to the United States Court of Appeals for the Eleventh Circuit, which first issued a panel opinion reversing the summary judgment for defendants. Jones v. Preuit & Mauldin, 808 F.2d 1435 (11th Cir. 1987). It held that § 1983 private party defendants are entitled to a qualified or good faith immunity if they "neither knew nor reasonably should have known that the attachments violated clearly established constitutional rights" and that a genuine issue of fact existed as to whether their conduct violated a clearly established constitutional right. On this ground it reversed

the summary judgment for defendants.

On petition for rehearing by defendants, a majority of the panel, Johnson, Circuit Judge, dissenting, changed its mind and affirmed the summary judgment for defendants, Jones v. Preuit & Mauldin, 822 F.2d 998 (11th Cir. 1987).

The plaintiff, Mr. Jones, then petitioned for rehearing en banc and this petition was granted and the previous panel decision vacated. Jones v. Preuit & Mauldin, 833 F.2d 1436 (11th Cir. 1987).

On rehearing by the Eleventh Circuit en banc, the summary judgment for defendants was again affirmed by a majority of seven, five judges dissenting. Jones v. Preuit & Mauldin, 851 F.2d 1321 (11th Cir. 1988). However, there was no majority opinion; four different opinions were written. The plurality of six

judges were of the opinion that private § 1983 defendants are entitled to immunity, and Preuit & Mauldin were entitled to immunity as a matter of law because at the time of the seizures Preuit & Mauldin should not reasonably have known that its actions violated Mr. Jones' clearly established constitutional rights. It refused to say whether or not the Alabama attachment scheme is constitutional and held it immaterial to the private immunity defense that Preuit & Mauldin rigged the judicial sale and bought the pickers for a fraction of the repair bills, the only element of private § 1983 immunity being that a reasonable person should not have known he was violating clearly established constitutional rights. Judge Tjoflat concurred in the result reached by the plurality on the ground that as a

matter of law the defendants did not cause the seizures. 851 F.2d at 1329-35. Judge Vance, writing a separate dissenting opinion, with great eloquence urged the United States Supreme Court to clear up the "doctrinal turmoil" in this area. He also joined with the other five dissenters in an opinion by Judge Johnson, rejecting the propriety of a qualified immunity defense in § 1983 actions, rejecting the notion that Preuit & Mauldin had successfully established such a defense if there were one, and stating the opinion that the Alabama attachment statutes were clearly unconstitutional under the Supreme Court holdings at the time of the seizures.

It is this in banc decision at 851 F.2d 1321 to which this petition for writ of certiorari is directed.

ARGUMENT

Reasons for granting the writ:

A. The decision below involves an important question on which the Circuits are divided: whether a private defendant who acts under color of state law to deprive another person of a constitutional right has some kind of immunity from liability under 42 USC § 1983; and if there be any private immunity, the important federal question is presented whether the elements of such an immunity are the same as the qualified or good faith immunity of public officers sued under § 1983, namely, that their conduct did not violate established statutory or constitutional rights of which a reasonable person would have known.

The court below recognized that the Circuits were split:

> Two of our fellow circuits have undertaken this analysis and have held that qualified immunity attaches to private defendants under Section 1983. See Butler v. Buechler, 706 F.2d 844, 850-53 (8th Cir. 1983); Folsom Investment Co. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. Unit A 1982). Two other circuits have held that private defendants are not entitled to qualified immunity. See Downs v. Sawtelle, 574 F.2d 1 (1st Cir.), cert. denied, 439 U.S. 910 (1978); Howerton v. Gabica, 708 F.2d 380, 385 n.10 (9th Cir. 1983).

851 F.2d at 1324.[2/]

[2/] Since that decision two other Circuits have considered the question. In De Vargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714 (1988), the Tenth Circuit decided that a qualified immunity from § 1983 claims could be pleaded by a federal government contractor which was required by its contract not to hire a one-eyed man as a security inspector at a classified reseach facility, but declined to hold that a qualified immunity is generally available to private § 1983 defendants. In Duncan v. Peck, 844 F.2d 1261 (1988), the Sixth Circuit, disagreeing with the Fifth and Eleventh Circuits, held that there is a good faith defense

In dealing with this question the Court below did not muster a majority opinion. The plurality opinion, concurred in by six judges, was that "private defendants are entitled to a defense of qualified immunity in wrongful attachment actions under section 1983," 851 F.2d 1324, and that in this context the sole factual inquiry narrows to this: "the defendant is immune unless he knew or reasonably should have known that his actions violated clearly established constitutional rights." Id. at 1325. Judge Tjoflat, concurring in the result, did so on what he perceived to be a lack

Footnote Continued

available to private § 1983 defendants, but that this was not the same as the good faith immunity of public officers based on the objective standard of whether a reasonable person would have known his conduct was clearly unconstitutional, but included subjective factors. 844 F.2d at 1266-67.

of proof of causation; however, he said if he assumes he was wrong about that, he would agree with the plurality in "extending official immunity law in this manner," Id. at 1332 in what is necessarily a "policy determination" (Id. at 1335). The minority of five judges found "no justification for allowing private defendants to assert such a defense." Id. at 1335, 1341. In a separate dissent, Judge Vance reviewed the many "inadequacies in the law under section 1983" and said, "I simply lament these inadequacies in the hope that the Supreme Court will undertake a wholesale reevaluation of current law." Id. at 1341.

Is there, should there be immunity for private defendants who violate § 1983? This Court has said that on its face, § 1983 "admits of no immunities."

Imbler v. Pachtman, 424 U.S. 409, 417 (1976). The statutory language provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(Emphasis added). We submit that the time has come for this Court to answer this question, pretermitted in Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 n.23 (1982), on which the court below and all the others which have considered it, are so deeply divided. It is an important question, and as Judge Vance

said below, "There is a large enough body of law so that we can understand the nature of the problem." Jones v. Preuit & Mauldin, 851 F.2d at 1341.

B. An equally important question is, if there be an immunity for private actors who violate § 1983, are the substantive elements of the immunity the same as the public officers' qualified or good faith immunity, that is, does the immunity depend only on "whether [Preuit & Mauldin] reasonably should have known that its actions violated Jones' constitutional rights?" Id. at 1326. Defining immunity in this way for government officials is supported by "strong public policy reasons," inasmuch as the officers function "in the nature of legislators and adjudicators," or their actions "necessarily involve

the. . . formulation of long-term policy," or if immunity were denied they would be deterred from acting forcefully and decisively in the public interest. Id. at 1342-43. The same policy reasons are not present in the case of private persons who under color of state law cause a deprivation of constitutional rights. The minority judges below were obviously right in pointing out that "private parties simply are not confronted with the pressures of office, the often split-second decision making or the constant threat of liability facing public officers, governors, and other public officials.' Downs [v. Sawtelle], 574 F.2d [1] at 15 [(1st Cir., 1978) cert. denied, 439 U.S. 910 (1978)]." 851 F.2d at 1343. The majority below found a "similarly powerful" policy basis for ex-

tending the public officer immunity to such private persons in that "we [must] encourage them to settle their differences and assert their claimed rights through the employment of legal mechanisms which they believe, in good faith, are constitutional." One may legitimately question that this desideratum is "similarly powerful" to the policies underlying the immunities of public officers. The dissenting justices could see "no sound policy reason." 851 F.2d at 1340. The immunity doctrine does not extend to municipalities (Owen v. City of Independence, 445 U.S. 662, 659 (1980)) nor to public defenders (Tower v. Glover, 467 U.S. 914, 922-23 (1984)). The policy said to justify private actor immunity would apply to municipalities and public defenders. In predicating a historical

justification for extending the public official immunity to private actors, on the elements of the common law tort of malicious prosecution, 851 F.2d at 1324-25, the majority invokes a set of social values significantly different from the goals of the public official immunity. In striking a balance between the rights of the person deprived of constitutional rights and the private actor, who acted in self-interest and not for the public interest, and where historically absence of malice and not "the King can do no wrong" is the source of any analogous doctrine, there is no reason to suppose that, assuming some immunity or defense in the private actor situation, it should be the same immunity given to public officials. After all, ex hypothesi there has been a deprivation of constitutional

rights. Ought it not to be relevant that the private actor really used the process of law to rip his victim off? The majority below says this is immaterial, that Preuit & Mauldin's manager Crisler's successful rigging of the judicial sale was not itself under color of state law so it cannot be considered. 851 F.2d at 1328, n.12. But the fact that the deprivation of constitutional right under § 1983 must be under color of state law does not mean the existence of an immunity thereunder can be determined only by reference to actions under color of state law. Both the collusive bidding on the most valuable picker and the grossly disproportionate prices paid for the three pickers, in relation to the repair bills alone, could rationally be considered in evaluating the good faith of the private

actor. The law prefers litigation over violent self-help but that is not the only social value at stake. As Judge Tjoflat's concurrence said, in meeting the task of fashioning the law in this area, the range of policy considerations the courts may take into account is at least as broad as the range of those a legislature would consider with respect to legislating an immunity. 851 F.2d at 1333. This Court has given weight in these unconstitutional seizure cases to the "tremendous hardship on wage earners with families to support" which may be caused. Sniadach v. Family Finance Corp., 395 U.S. 337, 340 (1969). It is perhaps worth considering the tremendous hardship on a poor but honest cotton farmer of summarily seizing his means of livelihood, the three cotton pickers, in

the midst of negotiations for refinancing, when in the ordinary course of a civil action for money only he may well have picked enough cotton to pay for one, two or all of them, or sold one to pay the bill on the others, or succeeded in refinancing them through his bank which was understandably reluctant after the ex parte seizure and challenge to its prior lien.3/

The writ of certiorari should be granted not only to determine whether an

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3/ The plurality below dismisses the ex parte prejudgment attachments as "inconsequential" because Preuit & Mauldin got a judgment on May 19, 1982 which could be levied on the three cotton pickers anyway. This ignores the tremendous hardship the seizures placed on Mr. Jones in his attempt to refinance through the Bank, and the error of the State trial court in ruling the Bank's lien was inferior to Preuit & Mauldin's attachment.

immunity or good faith defense exists in favor of private actors who violate § 1983, but further to determine whether the scope of that immunity or defense is as broad as that of public officials or should be more confined where there is evidence that the seizures were to carry out an unconscionable ripoff.

C. The decision below that the Alabama attachment scheme was not clearly unconstitutional at the time of the ex parte seizures on April 8, 1982 is in conflict with applicable decisions of this Court, notably North Georgia Finishing Co. v. Di-Chem. Inc., 419 U.S. 601 (1975).

An essential difference between the plurality and minority opinion below seems to be that the plurality opinion is that if the attachment statute doesn't

say the judge has no choice, it passes constitutional muster even though it intimates no standard (other than the bare requirements of conclusory affidavit and bond) for exercising any choice as to whether or not to issue an ex parte attachment; whereas the minority says that under such a scheme lacking guidelines the judge does not have the kind of discretion required by Mitchell to dispense with pre-seizure notice and hearing. We believe earlier decisions of this Court resolve this question in favor of the minority's interpretation of Mitchell; e.g., Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969), where it was held that such dispensation might be proper under a "statute narrowly drawn" to meet an unusual condition requiring special protection to a credi-

tor interest; similarly, Fuentes v. Shevin, 407 U.S. 67, 91 (1972), when "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." Therefore we submit that the plurality's reasoning, is inconsistent with the Sniadach and Fuentes cases inasmuch as it upheld a prehearing seizure under statutes not narrowly drawn to apply to particular unusual conditions requiring special protection to the creditor's interest.

The prevailing opinions below being in conflict with the decisions of this Court as to when a seizure is constitutionally permitted without prior hearing, the Court should grant the writ.

Secondly, the plurality and concurring opinion below seem to say Mr. Jones was entitled to an immediate postseizure hearing at which Preuit & Mauldin must prove their entitlement to the writ, because, though not authorized by statute or rule, a hearing was in fact conducted on a motion by Citizens Bank styled "Motion to Dissolve" sixty-eight days after the seizure. However, that hearing was not interlocutory but on a final submission of the merits of the entire case and only involved the question of superiority of Preuit & Mauldin's claim over the Bank's security interest. It did not have anything to do with the propriety of issuance of the writs. A final submission after sixty-eight days is neither immediate, nor prompt, nor is a determination of creditors' priorities a

real hearing on dissolution. Nor in this hearing was Preuit & Mauldin required to prove its right to issuance of the writ. There was no narrowly drawn statute providing for a hearing on dissolution, indeed such a hearing was clearly not authorized by Alabama law.

It was so obvious under prior rulings of this Court that the Alabama attachment scheme was unconstitutional that it had been declared obviously unconstitutional six months prior to the attachments involved in this case, by the very District Court in which this case originated. See 851 F.2d 1344, n.7.

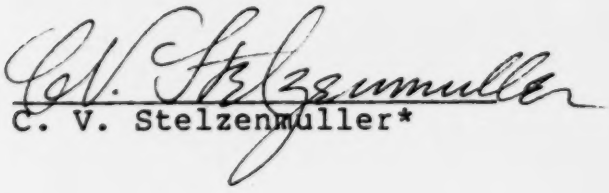
Finally, the writ of certiorari should be issued in this case for the reasons set out in Judge Vance's impassioned concurring opinion. The remarkable diversity and clash of opinions in

the panel decision, the decision on the first petition for rehearing, and in the four separate opinions on the rehearing in banc, alone suffice to demonstrate the law in this area is in need of oxygen tent treatment.

CONCLUSION

For the reasons stated above, petitioner Samuel Jones, Jr. respectfully requests that the Supreme Court grant this petition and review and reverse the decision of the Court of Appeals.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Petition for Certiorari has been served on all counsel of record by placing same in the United States mail, properly addressed and postage prepaid, this 4th day of November, 1988.

OF COUNSEL